No. 840

In the Supreme Court of the United States

OCTOBER TERM, 1946

MYRL ALEXANDER, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the district court (R. 52–72) is reported at 66 F. Supp. 183. The opinion of the circuit court of appeals (R. 81–87) is reported at 157 F. 2d 811.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1946 (R. 87). The petition for a writ of certiorari was filed January 2, 1947, and was granted January 20, 1947 (R. 89). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after conviction for refusing to submit to induction, respondent is entitled to resort to habeas corpus to challenge the judgment of conviction on the ground that the convicting court improperly rejected his proffered defense that his selective service classification was invalid.

2. If habeas corpus is an available remedy, whether the inquiry by the habeas corpus court should be limited to the question whether the defense was tendered and rejected by the convicting court or whether the habeas corpus court should also inquire into the jurisdiction of the classifying board.

3. If the latter, whether the habeas corpus court erred in finding that the final classifying board did not exceed its jurisdiction in refusing to classify respondent as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 57–66.

STATEMENT

A. *The administrative proceedings.*—The proceedings before the selective service boards, as shown by respondent's selective service file which is before the Court as an original exhibit, may be summarized as follows:

Respondent registered with his local board on June 30, 1942, giving his age as nineteen. On December 5, 1942, he filed his selective service

questionnaire. In that document he stated that he had a high school education and that he was ordained in December 1939, and started functioning as a minister of religion in the Jehovah's Witnesses sect in 1939. He further stated that he had worked from 1941 to 1942 in the maintenance of mechanical radio signal apparatus. Other evidence before the board showed that this referred to his full-time job with the Radio Corporation of America, which respondent gave up shortly after he registered with his local board in June 1942. Respondent attached to the questionnaire a statement in which he asserted *inter alia*, that he had studied the Bible from 1935 to 1939, and that he was baptized in December 1939. He also submitted a document from the Watchtower Bible and Tract Society which contained the additional fact that respondent had become a "pioneer" in the sect on July 1, 1942—one day after he registered with his local board.

On December 31, 1942, the local board was advised by State Selective Service Headquarters that respondent's name was not included in the list of ministers furnished to the Selective Service System by the Watchtower Bible and Tract Society. Thereafter, on February 4, 1943, respondent submitted a copy of Opinion No. 14 of the Director of Selective Service, which held that a person whose name was not on the list could be classified as a minister if the local board determined that the proof submitted by the registrant

satisfactorily demonstrated his ministerial status. On March 29, 1943, the local board classified respondent in I–A. He requested a personal appearance before the board and submitted supporting documents from four other Jehovah's Witnesses to the effect that he was a minister of religion. On April 29, 1943, respondent was reclassified IV–D, as a minister of religion.

Nothing further occurred until August 23, 1944, when the local board was indirectly informed by one of respondent's neighbors, who was identified, that respondent spent most of his time at home, except when working as a professional model, in which capacity he sometimes posed in military uniform. Apparently as a result of this information the local board reclassified respondent I–A. He then requested a hearing before the board. Respondent submitted an additional statement of his own and a statement from another Jehovah's Witness to the effect that he devoted 150 hours each month to his religious activities and that among his duties he performed those of a "stock servant," "study conductor" and an "instructor" in the theocratic ministry course. Respondent appeared before the local board on August 30, 1943, and at the conclusion of the hearing the following notation was made as a minute entry in respondent's file:

> When registrant appeared it was learned after interrogation that he was an artist model—and has been photographed in mili-

tary uniform; when further questioned regarding C. O. in military uniform his reply was evasive.

The board continued respondent in I–A. Thereafter he took an appeal to the board of appeal and on September 8 he submitted a statement on appeal to the board, as the selective service regulations permit,[1] in which he informed the board; *inter alia*, that he did not average two hours a week in secular work. He underwent a preinduction physical examination, and on September 28, 1944, the board of appeal unanimously classified respondent I–A.

On October 8, 1944, respondent requested another hearing before the local board. A hearing was had on October 11, but the classification was not reopened. On October 19, respondent requested the Director of Selective Service to appeal his case to the President, but the request was not granted. Respondent was then ordered to report for induction on November 9, 1944. He reported, but refused to submit to induction.

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[1] Section 627.12 provides:

"The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

B. *The judicial proceedings.*—Thereupon, respondent was indicted (R. 22) for refusing to submit to induction, in violation of the Selective Training and Service Act of 1940. He had a jury trial in the District Court for the Southern District of New York at which the material contents of his selective service file were received in evidence (Tr. 35–46),[2] but other evidence proffered by him for the purpose of showing that his selective service classification was invalid was excluded (Tr. 62, 64–66, 81–89, 92–94, 99–103). The jury was instructed (Tr. 190–194) that the classification was final and not open to attack in the criminal trial. Respondent was convicted and on May 7, 1945, he was sentenced to imprisonment for three and one-half years (R. 21). He did not appeal (R. 35–36).

On February 4, 1946, this Court decided *Estep* v. *United States,* 327 U. S. 114. On February 27, respondent filed the present petition for a writ of habeas corpus in the District Court for the District of Connecticut (R. 6–19). In general terms, respondent alleged that the indictment and subsequent judicial proceedings are void because he is a minister of religion and the draft board therefore had no authority to order him to submit to induction; that the indictment and subsequent ju-

[2] The designation "Tr." refers to the stenographic transcript of the criminal trial which is before the Court as an original exhibit.

dicial proceedings are void because they are founded on a void induction order; and that the judgment and commitment are void because at the trial respondent was denied the right to trial by jury and was denied the opportunity to prove "any substantial defense" to the indictment (R. 7). The petition summarized the proceedings before the selective service boards (R. 8–14) and in the convicting court (R. 14–16) and requested the habeas corpus court to review the question of respondent's exemption from military service under the Act, and to pass on his contention that the final classification of the board of appeal had no support in evidence and resulted from prejudice and arbitrariness on the part of the board (R. 17).

The writ issued on February 27, 1946 (R. 23–24), and petitioner filed a return (R. 26-29) alleging that respondent was confined pursuant to a valid judgment and commitment and denying the power of the court, on the basis of the facts alleged, to review either the judicial or administrative proceedings. Thereafter, petitioner filed a supplemental return (R. 30–33), which set forth a chronological summary of the administrative proceedings. At the habeas corpus hearing, petitioner tendered to the court a stenographic transcript of the proceedings in the convicting court, respondent's selective service file, and the 1943 yearbook of the Watchtower Bible and Tract So-

ciety, all of which were admitted in evidence (R. 37–43). The only evidence adduced by respondent consisted of a copy of his exceptions to the charge of the convicting court (R. 44–45, 47–51). He submitted no evidence bearing on the proceedings before the selective service boards.

In a memorandum opinion (R. 52–72), the district court below held that habeas corpus was available to respondent to determine whether he had been denied any constitutional right (R. 55), and it then turned to the questions whether there was a basis in fact for the refusal of the selective service boards to classify respondent as a minister and whether the boards failed in any material respect to comply with the Selective Service Regulations. The court held that there was evidence to support the classification, that there was no evidence of arbitrary or capricious administrative action, and that respondent had not been denied any procedural right (R. 67–70). Having thus determined that the administrative action was "valid in law and in fact," the district court concluded that respondent had not been deprived of a valid defense by the convicting court (R. 72). Accordingly, the writ was discharged. Respondent was thereafter released on bail pending appeal (R. 73–74).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 87). The court held that habeas corpus was

available to respondent, and that it is in the nature of a substitute for an appeal from the conviction, although respondent failed to take such an appeal. Reasoning from the premise that respondent was entitled to show, if he could, the invalidity of his induction order at his criminal trial, the court reversed the judgment of the district court discharging the writ of habeas corpus because respondent had not been allowed to make the defense at his trial and ordered respondent released from custody. The circuit court of appeals did not pass on the question of the local board's jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that habeas corpus is an available remedy to inquire into the validity of the ruling of the convicting court rejecting respondent's proffered defense of invalid classification.

2. If habeas corpus is an available remedy, in failing to inquire into the jurisdiction of the local board, as the *Estep* opinion requires.

3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

In a habeas corpus proceeding such as this the sole inquiry is whether the convicting court initially had jurisdiction of the person and the

subject matter and whether anything occurred in the course of the trial to cause it to lose jurisdiction. *Bowen* v. *Johnston*, 306 U. S. 19, 23–24. It is undisputed that the convicting court had jurisdiction of the person of respondent, that the prosecution was founded upon a constitutional statute, and that the indictment alleged a crime "cognizable under the authority of the United States." Section 24 (2) of the Judicial Code, 28 U. S. C. 41 (2). The initial jurisdiction of the court is therefore established. We think it equally clear that the court did not lose jurisdiction in the course of the trial by virtue of its exclusion of respondent's tendered defense.

In May 1945, when respondent went to trial, it was the consensus of judicial opinion that the provision of Section 10 (a) (2) of the Act making the board's classification final meant that the classification was subject to judicial scrutiny only after the registrant had submitted to induction. The decision in *Falbo* v. *United States*, 320 U. S. 549, was regarded by the lower federal courts, by prosecuting officials and by most members of the bar as firmly establishing this construction. Therefore, when respondent sought to defend in the criminal trial for refusing to submit to induction on the ground that his classification was illegal, the trial judge had no hesitation in excluding the defense. The decision in the *Estep* case, 327 U. S. 114, almost one year later, establishes

that the finality provision of the Act does not foreclose judicial inquiry into the jurisdiction of the boards in a prosecution for refusing to submit to induction, and it likewise establishes that the convicting court here adopted the wrong construction of the statute. Thus, the crucial question is whether the erroneous, but tenable, construction of the statute caused the court to lose jurisdiction or, as respondent contends, amounted to a denial to respondent of an opportunity to defend.

This Court considered an analogous question in *Collins* v. *Johnston*, 237 U. S. 502, 506–507, where it was contended that the exclusion in a perjury trial of a proffered defense that the false testimony was not material to the trial in which it was given deprived the convicting court of jurisdiction to enter judgment. The Court held that the refusal of the proffered defense, if erroneous, was an error committed in the exercise of jurisdiction, which was not subject to collateral inquiry in habeas corpus. Bearing in mind the admonition of Mr. Justice Holmes in *Lamar* v. *United States*, 240 U. S. 60, 64–65, that "Jurisdiction is a matter of power and covers wrong as well as right decisions," we think the holding of this Court in the *Collins* case requires the same conclusion here. The Fourth (*Sunal* v. *Large*, 157 F. 2d 165, pending on writ of certiorari, No. 535) and Fifth (*Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, 327 U. S. 794) Circuits have held in similar selective

service cases that an erroneous construction of the finality provision of Section 10 (a)-(2) is an error of law correctible on appeal and does not affect the jurisdiction of the convicting court. Cf. *Warring* v. *Colpoys*, 74 App. D. C. 303, 122 F. 2d 642, certiorari denied, 314 U. S. 678. Numerous illustrations are cited in the Argument (*infra*, pp. 33–34) of analogous situations in which this Court has held that a variety of serious errors of law in the course of a trial are not matters affecting the jurisdiction of the convicting court.

The contention that the error of the convicting court must be treated as a denial of the right to defend is untenable. Respondent enjoyed every right of defense which our judicial procedure guarantees. If he were retried today, he would be treated no differently, except that in view of the *Estep* decision, the trial court would hold that the defense of illegal classification is admissible. Thus, the sole purpose of a new trial would be to correct an error of law in the course of the trial. This is qualitatively quite different from the situation in *Windsor* v. *McVeigh*, 93 U. S. 274, where the defendant was denied the opportunity to be heard at all. See *Escoe* v. *Zerbst*, 295 U. S. 490, 494.

In May 1945, when the judgment of conviction was entered, the jurisdiction of the convicting court was plain. Today, the *Estep* decision reveals an error of law on the part of the trial

court, but it does not establish that the court lost jurisdiction to enter its judgment.

This case is not of the same pattern as *Eagles* v. *Samuels*, No. 59, decided December 23, 1946, or *Bridges* v. *Wixon*, 326 U. S. 135. In those cases the petitioner was detained pursuant to an administrative order, and the habeas corpus court probed the legality of the order. Here, respondent was detained pursuant to a judgment and commitment of the United States District Court for the Southern District of New York. The function of the writ is to inquire into the jurisdiction of that court. Since respondent was not detained pursuant to the order of his local board, there is no occasion to inquire into the legal validity of that order.

II

In *Estep* v. *United States*, 327 U. S. 114, 123–125, this Court said that if, upon a trial for refusing to submit to induction, a registrant could not defend "* * *" on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*." If, despite the considerations advanced in Point I of the Argument, the Court reaffirms the *Estep* dictum, the decision of the circuit court of appeals nevertheless is erroneous. For notwithstanding the fact that respondent requested the district court

in the habeas corpus hearing to inquire into the legality of his classification (see R. 17–18), and that the court complied with the request, the court below held that the habeas corpus court possessed no authority collaterally to inquire into the administrative proceedings. The Second Circuit held that the sole inquiry was to determine whether a tenable defense was offered and rejected in the convicting court, and having concluded that respondent made out a tenable defense, the court reversed the judgment of the district court without passing on the jurisdiction of the selective service boards, as the *Estep* dictum requires. Thus, there still remains for decision the question whether the board of appeal exceeded its jurisdiction in refusing to classify respondent as a minister of religion.

III

Assuming that, following its practice in similar cases, this Court decides to consider the jurisdiction of the selective service boards without remanding the case for consideration thereof by the Second Circuit, the only remaining question is whether there is any evidence to support the refusal of the board of appeal to classify respondent as a minister of religion.

The administrative interpretation of the ministerial exemption as applied to the Jehovah's Witnesses sect permits the board to classify a registrant in IV–D if it determines that he stands

in the same relationship to members of his sect as a minister stands to his congregation in other religious groups. See State Director Advice No. 213–B, *infra,* pp. 60–65. This is to be determined in each individual case based upon—

1. Whether the registrant devotes his life in furtherance of the beliefs of Jehovah's Witnesses; and

2. Whether he performs functions which are performed by regular or duly ordained ministers of other religions; and

3. Whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

The facts which were before the board of appeal when respondent was finally classified are summarized, *supra,* pp. 2–5.[2] Among the facts which militate against respondent's claim, which the board was entitled to regard as persuasive, are the following: (1) respondent was a young boy who had no specialized religious training in preparation for the ministry other than that which all Jehovah's Witnesses have in studying the Bible; (2) after he allegedly became a minister, respondent obtained a full-time secular job in an industrial plant and retained it until shortly after he registered for the draft; (3) although he tendered evidence showing that he was a "pioneer" in the sect, his name was not contained

in the list of "pioneers" furnished the Selective Service System by the Watchtower Society and the list published by the sect in its magazine "Consolation"; (4) respondent did not inform the board after he was classified IV–D that he was engaged in work as a model, which work included posing in uniform; (5) when respondent was interrogated concerning these activities his answers were "evasive"; (6) respondent's claim that he did not average two hours a week in secular work was uncorroborated, although records of his employment were undoubtedly available to him; (7) a neighbor informed the board that when respondent was not working as a model, he usually was at home; (8) there is no evidence that respondent performed the functions usually associated with a minister or that his activities differed in quality from those of other members of the sect.

Viewing respondent's situation as a whole, we submit that the board of appeal could reasonably have concluded that respondent is a devout member of the sect, but that neither in training nor in function is he in any different status from that of the other members of the sect. He was not the spiritual leader of the local unit of the sect. He was a member of the sect who claimed that commencing on the day after he registered for the draft, he devoted five hours daily to the regular activities of the sect. Since it is clear that the board's conclusion did not flout the command of Congress, judicial inquiry is at an end.

ARGUMENT

It is now settled law that a registrant who has exhausted his administrative remedies is free to challenge the validity of an induction order of his local board by showing that the board exceeded its jurisdiction. *Estep* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, No. 23, this Term, decided December 23, 1946. Thus, where a registrant has submitted to induction he may do this by resorting to habeas corpus to challenge the legality of his being held for military service. See *Eagles* v. *Samuels*, No. 59, this Term, decided December 23, 1946. Where he refuses to submit to induction, the *Estep* decision establishes that he is free to assert the challenge as a defense in his criminal trial for having refused to submit to induction. This case presents a third situation, which although discussed in the *Estep* opinion (327 U. S. at 123–125), has not yet been before this Court for decision. Respondent refused to submit to induction and upon his trial for failure to perform a duty required by the Selective Training and Service Act he tendered the defense of illegal classification; it was rejected, and upon his conviction he came into petitioner's custody pursuant to the judgment of the convicting court.

The basic question here is whether and to what extent habeas corpus is now available to correct the error of the trial court.

In the discussion which follows, we consider first whether habeas corpus is available at all in the circumstances of the present case. We examine the judgment of conviction, show that it is neither void nor deficient in any element of constitutional fairness, and hence conclude that habeas corpus will not lie to release one held in custody pursuant to its terms.

Alternatively, if this view is rejected, we turn to the dictum in the *Estep* case which states that habeas corpus is available after conviction to inquire into the jurisdiction of the local board, and we conclude that, even if this approach be adopted, the court below erred in not making collateral inquiry into the local board's jurisdiction.

Assuming then that such inquiry should now be made, we discuss the considerations which support the judgment of the district court in the present proceeding that respondent's local board did not exceed its jurisdiction but properly classified respondent as one available for military service.

I

SINCE RESPONDENT WAS IN PETITIONER'S CUSTODY PURSUANT TO A JUDGMENT WHICH, THOUGH ERRONEOUS IN THE LIGHT OF DECISIONS THEREAFTER RENDERED, WAS NOT VOID, THERE IS NO BASIS FOR ORDERING HIS DISCHARGE ON HABEAS CORPUS

The substantial difference between this case and cases such as *Eagles* v. *Samuels, supra,* p. 17, and *Bridges* v. *Wixon,* 326 U. S. 135, and the various

other deportation cases collected in footnote 14 of the *Estep* opinion (327 U. S. at 123), is the existence here of a final valid judgment of a court of competent jurisdiction pursuant to which respondent was held in petitioner's custody. In the *Samuels* case the propriety of the exercise of military jurisdiction over the petitioner depended on the legality of his induction order. In the deportation cases the petitioners were confined on the basis of deportation orders. In these situations habeas corpus probes the jurisdiction of the administrative agency to make the order pursuant to which the petitioners were in custody. In this case, however, respondent was not confined pursuant to an administrative order; petitioner's custody of respondent was in compliance to a judgment and commitment of the United States District Court for the Southern District of New York. It is respondent's burden to demonstrate that petitioner's custody of him pursuant to that judgment is "in violation of the Constitution or of a law * * * of the United States * * *" (R. S. 753, 28 U. S. C. 453).

At this late date, it is fundamental habeas corpus law that where the convicting court has jurisdiction of the person and subject matter in a criminal prosecution the judgment of conviction is not subject to collateral attack.[3] "The scope of

[3] See generally, Dobie, *Habeas Corpus in the Federal Courts*, 13 Va. L. Rev. 433.

review on *habeas corpus* is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged." If there was no jurisdiction in the convicting court from the beginning or if in the course of the proceedings the defendant's constitutional rights have been denied, habeas corpus is available. *Bowen* v. *Johnston*, 306 U. S. 19, 23–24; *Hawk* v. *Olson*, 326 U. S. 271, 274–276; *Eagles* v. *Samuels*, *supra*, slip opinion, p. 7.[4] It is equally well settled that a collateral examination of the power of the convicting court to render its judgment does not extend to an inquiry into "mere errors in point of law, however serious, committed by the criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance." *Frank* v. *Mangum*, 237 U. S. 309, 326; *Matter of Gregory*, 219 U. S. 210, 213; *Harlan* v. *McGourin*, 218 U. S. 442, 447–448; *Hans Nielsen, Petitioner*, 131 U. S. 176, 184.

[4] In *Waley* v. *Johnston*, 316 U. S. 101, 104–105, this Court characterized the circumstances in which habeas corpus extends to the denial of a constitutional right as follows:

"* * * The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."

See also, *Lamar* v. *United States*, 240 U. S. 60, 64–65. In the words of Mr. Chief Justice Marshall in *Ex Parte Watkins*, 3 Pet. 193, 203:

> An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.

We think there can be no question under the cases that the convicting court was not initially without jurisdiction. For the court had jurisdiction over the person of respondent, the prosecution was founded upon a constitutional statute, and the indictment alleged a crime "cognizable under the authority of the United States." Section 24*(2) of the Judicial Code, 28 U. S. C. 41 (2). It was for the court to determine in the exercise of its jurisdiction whether respondent knowingly failed to perform a duty required of him by the act, as the indictment alleged, and in performing this function the court had power to rule on the admissibility of evidence tendered by respondent and on the legal validity of any defense asserted by him. *Knewel* v. *Egan*, 268 U. S. 442, 446; *Matter of Gregory*, 219 U. S. 210, 217; cf. *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376; *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172.

When petitioner went to trial, it was the Government's burden to prove that he was a registrant under the Selective Training and Service Act who

had been finally classified I–A and ordered to report for, and submit to, induction, and that respondent knowingly refused to do this. The Government's evidence established these facts. In meeting the Government's case, respondent was entitled to show that he did not act knowingly or that he had no duty under the statute. And it is now settled by the *Estep* decision that one way in which he could make the latter showing was by establishing that his local board had exceeded its jurisdiction in classifying him I–A and ordering him to report for induction.

However, at the time of the trial a different view of the law prevailed. As the court below noted (R. 82–84), in May 1945, it was the consensus of judicial opinion that the finality provision of Section 10 (a) (2) of the Act foreclosed all judicial investigation of the legality of a selective service classification until the registrant had submitted to induction. See *Estep* v. *United States*, 327 U. S. at 123, and the concurring opinion of Mr. Justice Frankfurter at pages 138–139. Accordingly, when respondent proffered his defense of illegal classification the trial court rejected it. It is plain from the trial court's rulings on the question that the Court regarded the *Falbo* decision as dispositive of the contention advanced by respondent. We now know that the *Falbo* decision did not foreclose the defense, and that the fact that a selective service classification is "final"

does not mean that after the administrative remedies have been exhausted judicial inquiry may not be had into the jurisdiction of the selective service boards. But this hindsight establishes only that the trial court committed an error of law. The error of the trial judge was that he undoubtedly either misread the *Falbo* decision or misconstrued the finality provision of Section 10 (a) (2), or probably did both. But that is all. The trial judge did not surrender his function to outsiders or conduct a sham trial. He performed his function in the highest traditions of the judicial office, accorded respondent an eminently fair trial, but as occasionally occurs, he made what was subsequently held to be an error of law.

Respondent alleged in his petition for a writ of habeas corpus (R. 7, 15–16) and argued in the district court (R. 36, 37) that this error of law constitutes a denial of his right to defend to the indictment and is thus a deprivation of due process of law and of his right to a jury trial. Accordingly, it was argued that the convicting court lost jurisdiction to render its judgment. Respondent is unable to point to any authority which holds that an erroneous, though tenable, construction of a statute, which results in the exclusion of evidence shown to be material for the defense carries with it any such constitutional implications—not unnaturally, perhaps, because all the cases which

have ever passed squarely on the question hold precisely the contrary.

Due process in the constitutional sense means a prosecution under a valid law conducted according to the settled course of judicial proceedings, which includes notice and a hearing before a court of competent jurisdiction according to established modes of procedure. *Frank* v. *Mangum*, 237 U. S. 309, 326. In the instant case, respondent was tried in a manner consistent with the requirements of due process, and in accordance with the established modes of judicial procedure.

In the course of that trial, the court was called upon to construe Section 10 (a) (2) of the Selective Training and Service Act and the *Falbo* decision. Its construction was neither arbitrary nor unreasonable; to the extent that the trial court had a choice between two views of the finality provision of Section 10 (a) (2), it adopted the one which at the time was unanimously accepted by bench and bar, and which three Justices of this Court thought was required. See *Estep* v. *United States, supra*. Indeed, at the time of the trial, a contrary ruling could have been made only in the teeth of established precedents, and it is not without significance that respondent so far acquiesced in the result that he did not appeal. But, right or wrong, the trial court's ruling did not involve any deprivation of constitutional

right. "* * * in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because if is wrong or because earlier decisions are reversed." *Patterson* v. *Colorado*, 205 U. S. 454, 461.

The subsequent decision of this Court in the *Estep* case shows only that the trial court adopted the wrong construction of the Selective Training and Service Act, and that, if the case were still open for direct appeal, the appellate court would be required to reverse the judgment. But we are not dealing here with direct review by way of appeal; this is collateral review by way of habeas corpus, to inquire into the jurisdiction of the convicting court. And the decisions make it perfectly plain that a trial court has power—i. e., jurisdiction—to construe a statute, and does not lose that power nor exceed that jurisdiction, regardless of the correctness of its construction. As Mr. Justice Holmes said, speaking for the Court in *Lamar* v. *United States*, 240 U. S. 60, 64–65:

> Jurisdiction is a matter of power and covers wrong as well as right decisions. * * * And nothing can be clearer than that the District Court, which has jurisdiction of all crimes cognizable under the authority of the United States (Judicial Code of March 3, 1911, c. 231,

> § 24, second), acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong.

The same concept underlies the decision in *Price* v. *Johnston*, 125 F. 2d 806 (C. C. A. 9), certiorari denied, 316 U. S. 677,[5] where in habeas corpus it was urged that the convicting court lost jurisdiction by an erroneous ruling on the admissibility of evidence alleged to have been illegally seized in violation of the defendant's constitutional rights. In rejecting the argument, the court said (125 F. 2d at 811)—

> When the allegedly illegally procured evidence was offered during the course of the prosecution, and objection was made thereto, it was the duty and the right of the trial judge to rule thereon. The right of a trial judge to make a ruling during the course of a trial carries with it the possibility of ruling wrongly as well as correctly. It is absurd to assert that the jurisdiction of the court hinges upon the mere right or wrong of a ruling on the admissibility of evidence during the course of a trial; that if the court's ruling on an objec-

[5] See also, *Van Meter* v. *Snook*, 15 F. 2d 377 (C. C. A. 5); *Sanford* v. *Robbins*, 115 F. 2d 435, 438 (C. C. A. 5), certiorari denied, 312 U. S. 697; *Cash* v. *Huff*, 142 F. 2d 60 (C. C. A.), certiorari denied, 323 U. S. 747; *Mrozik* v. *Johnston*, 148 F. 2d 149 (C. C. A. 9), certiorari denied, 325 U. S. 878; *Capone* v. *Aderhold*, 2 F. Supp. 280, 283–284 (N. D. Ga.), affirmed, 65 F. 2d 130 (C. C. A. 5).

> tion made be correct, the court continues to retain jurisdiction, but if it errs, the entire proceeding is void. If the trial court erred, and the error was prejudicial, reversal would follow on appeal, as in other prejudicial error, but the mistake would not thereby deprive the trial court of jurisdiction so that the convicted person, thereafter whenever he saw fit, could launch a collateral attack upon a judgment, valid upon its face. * * *

The danger of a contrary view is that every error at a trial, error not deemed sufficiently substantial to warrant taking an appeal, would become clothed with jurisdictional implications. The necessary consequence would be that the writ of habeas corpus would thereby be perverted into what is simply a delayed motion for a new trial, available long out of time, which will forever keep open the prospect that on some later and, it may be, brighter day, the record of trial can be once more reviewed in a more favorable legal climate, and the defendant released from custody for what is then shown to be an error of law on the part of the trial judge. Criminal litigation instead of being speedily terminated would wend its way through the courts via the habeas corpus route long after the time for appeal has expired. See *Capone* v. *Aderhold*, 2 F. Supp. 280, 283–284 (N. D. Ga.), affirmed, 65 F. 2d 130 (C. C. A. 5). Compare *United States* v. *Johnson*, 327 U. S. 106;

United States v. *Smith,* No. 498, this Term. It is true that *Bowen* v. *Johnston,* 306 U. S. 19, cautions against using habeas corpus as a writ of error even where jurisdictional infirmities which could have been urged on appeal, are asserted. But the rule "is not one 'defining power but one which relates to an appropriate exercise of power" (306 U. S. at 27), and the fact that only "exceptional circumstances" will justify issuance of the writ even where the jurisdictional question was open to direct review affords little assurance that a trial which was invulnerable at the time when it was held will not be voided at a later date because of an intervening judicial construction of the statute involved.

The decision by a strong bench (Vinson, Edgerton, and Rutledge, JJ.) of the U. S. Court of Appeals for the District of Columbia in *Warring* v. *Colpoys,* 74 App. D. C. 303, 122 F. 2d 642, certiorari denied, 314 U. S. 678, furnishes an interesting analogy with the situation at bar. Warring was convicted of contempt in 1939 under the doctrine of *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, in connection with jury tampering. In 1941, after the decision in *Nye* v. *United States,* 313 U. S. 33, overruled the *Toledo Newspaper* case, Warring petitioned for a writ of habeas corpus; he challenged the jurisdiction of the convicting court on the ground that his case was indistinguishable from that of *Nye.* On

the appeal, the Government conceded, and the Court of Appeals agreed, that if Warring's wrongful acts had occurred after the *Nye* decision, the convicting court would have no power to punish him in criminal contempt proceedings. Nevertheless, the Court of Appeals held that the convicting court had not been without jurisdiction. In a carefully reasoned opinion by Mr. Justice Vinson, the court said (74 App. D. C. at 308, 122 F. 2d at 647):

> We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The *Nye* case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then, is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be downright chaotic.

Similarly, in the present case, when respondent was convicted there was, as the court below so persuasively demonstrates (R. 84), a uniformity of judicial opinion that the finality provision of Section 10 (a) (2) of the Act foreclosed the defense tendered by respondent at the criminal trial. Approximately one year later, this Court decided the *Estep* case. By analogy to the *Warring* decision, it would seem that, while the *Estep* decision now makes plain the fact that the convicting court adopted an erroneous construction of the statute, the jurisdiction of that court must be judged in terms of the understanding of the law in 1945 when respondent was convicted. So judged, there is, of course, no basis for even doubting the court's power.

The view that the erroneous construction of the statute and of the *Falbo* decision is not a jurisdictional defect also rests firmly upon a decision of this Court. In *Collins* v. *Johnston*, 237 U. S. 502, a petition for a writ of habeas corpus was predicated on the claim that the petitioner, who had been convicted for perjury, was deprived of due process because the convicting court refused to consider "a valid and legally conclusive defense," viz., that the false testimony upon which the charge was based was not material to the trial at which it was given. This Court held that the petition for a writ of habeas corpus was properly denied without a hearing, because it

appeared on the face of the petition that the petitioner was not entitled to the writ. In respect of the question whether the convicting court had lost its jurisdiction by rejecting the proffered defense, this Court said (237 U. S. at 506–507):

> Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.[a]

The Fifth Circuit reached the same conclusion in *Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, 327 U. S. 794, which on its facts is indistinguishable from the instant case. The court below sought to distinguish the *Rea* decision on the ground that it was announced prior to the *Estep* decision and that it therefore assumed that the *Falbo* case foreclosed the defense of misclassification in the criminal trial. It is true that the *Falbo* case was discussed, but the rationale of the Fifth Circuit's opinion, as announced by Judge Sibley,

[a] The Court also concluded, alternatively, that on the merits the asserted defense was not a good one, for the facts did not show that the false testimony was not material to the case in which it was given.

was that if there was error in rejecting the proffered defense, it was reviewable only on appeal (153 F. 2d at 191): "The Oklahoma [convicting] court had jurisdiction of the accused and of the crime charged; and the writ of habeas corpus, as has often been ruled, is not a remedy for errors committed in the trial."

The Fourth Circuit reached the same conclusion in *Sunal* v. *Large*, 157 F. 2d 165, 171, pending on writ of certiorari, No. 535, this Term:

> * * * The defendant was not denied the right to defend against the particular charge that was made, which was his willful refusal to take the induction oath. The adverse ruling on his proffered evidence was, it must now be conceded, a trial error which could and should have been corrected on appeal. But it is a misnomer to say that the trial error caused the court to lose jurisdiction in the case. It resulted in an erroneous judgment but this is far different from an absence of jurisdiction. In rejecting the proffered evidence the trial court evidently acted on its interpretation of the meaning of the "finality" of decision of the Local and Appeal Boards under the Selective Service Act, 50 U. S. C. A. Appendix § 310 (a) (2) and its understanding of the decision of the Supreme Court in the Falbo case. It was called upon to construe and apply the Act. In its ruling, erroneous though it was, the court was exercising a jurisdiction which it undoubt-

> edly had and it cannot properly be said to have "lost jurisdiction" because of the error in exercising it. * * *

See also, *United States ex rel. Lohrberg* v. *Nicholson*, 141 F. 2d 689 (C. C. A. 4), certiorari denied, 322 U. S. 744.

Nor is *Collins* v. *Johnston*, 237 U. S. 502, an isolated decision. In similar circumstances this Court has consistently and persistently rejected arguments that analogous errors of law impaired the jurisdiction of the convicting court. In *Andrews* v. *Swartz*, 156 U. S. 272, the Court held that the convicting court did not lost jurisdiction by its refusal, even if erroneous, to permit the defendant to establish that members of his race were purposefully excluded from the panel of the grand and petit jurors. In *Matter of Moran*, 203 U. S. 96, 105, an asserted violation of the privilege against self-incrimination was held not to have deprived the convicting court of jurisdiction. In *Harlan* v. *McGourin*, 218 U. S. 442, this Court refused to inquire in habeas corpus to determine whether there was any evidence to support the conviction. The exclusion in an extradition proceeding of "impressive evidence of insanity," if error, was held not to be jurisdictional in *Charlton* v. *Kelly*, 229 U. S. 447. The erroneous refusal of the convicting court to allow the defendant compulsory process for the obtaining of his witnesses furnished no basis for habeas

corpus relief in *Ex Parte Harding*, 120 U. S. 782. In *Valentine* v. *Mercer*, 201 U. S. 131, relief by habeas corpus was denied where the convicting court neglected to instruct the jury as to its right to acquit the defendant. A departure from a statutory grant of time in which to prepare for trial was held to be an error of law, but not cognizable in habeas corpus in *McMicking* v. *Shields*, 238 U. S. 99. In *Kaizo* v. *Henry*, 211 U. S. 146, the alleged disqualification of eight grand jurors was held to have rendered the judgment voidable, but not void. In *In re Eckart*, 166 U. S. 481, the Court refused on habeas corpus to discharge a petitioner who was sentenced to imprisonment for first-degree murder, notwithstanding the fact that the jury failed to specify the degree of the crime, the Court pointing out that it was for the trial court to construe the legal meaning of the verdict and that if it erred, this was an error in the exercise of jurisdiction, not one which presented a jurisdictional defect. And in *Felts* v. *Murphy*, 201 U. S. 123, 130, though the Court was moved to remark that "the facts appearing on this record may seem to be somewhat hard," it refused relief by way of habeas corpus to a defendant almost totally deaf, who was unable to hear the testimony at his trial, because it was not repeated to him through an ear trumpet, and who, because of his impecunious condition, could not appeal.

It is plain, therefore, that habeas corpus is not available for the collateral review of errors of law committed by the trial court. Nor does the error here rise to the dignity of a denial of constitutional rights, under the rule of *Bowen* v. *Johnston*, 306 U. S. 19, *Waley* v. *Johnston*, 316 U. S. 101, and related cases.

The suggestion in the opinion below, that the error of the convicting court in the case must be treated as a denial of the right to defend is, as the *Sunal* decision correctly indicates (157 F. 2d at 171), "untenable in its application to the particular case." The fact is that respondent enjoyed every right of defense which our system of judicial procedure guarantees. He was not denied the opportunity to challenge the indictment prior to trial; he participated in the selection of a jury; he cross-examined Government witnesses; he presented defense testimony;[1] he had an opportunity to establish that he did not intentionally violate the statute; he argued his case to the jury; he submitted requested instructions to the court; and in general he enjoyed the very same rights as a defendant that he would receive if he were brought to trial today. There is a substantial qualitative difference between

[1] Compare *Tung* v. *United States*, 142 F. 2d 949 (C. C. A. 1), which illustrates a situation in which the defendant established as a defense that he had not been finally classified because his appeal had not been considered by his board of appeal; his conviction was therefore reversed.

denying a defendant his right to defend and the situation in this case where a defendant in presenting his defense tendered a line of evidence which the trial court in the exercise of its jurisdiction erroneously excluded. The difference was well put by Mr. Justice Cardozo, speaking for the Court in *Escoe* v. *Zerbst*, 295 U. S. 490, 494:

> * * * When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint. * * * *

Unquestionably, the exclusion of respondent's line of evidence, which was his only substantial defense, was error adversely affecting his rights. But so far as due process of law is concerned, the situation is no different than it would have been if the rejected line of evidence were but one of several defenses tendered by respondent. The fact that respondent relied upon only one defense does not invest with constitutional dignity something that is simply an ordinary trial error. Like *Smith*, *Estep*, *Dodez* and *Gibson*, respondent had an available corrective procedure by appeal which he chose not to pursue. The assertion of "excep-

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*Cf. *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 282-284, where the defendant was denied the opportunity to be heard.

tional circumstances" cannot justify collateral review of a trial error which rendered the judgment voidable, but not void.

In this respect we are unable to agree with the view of the *Sunal* decision (157 F. 2d at 168–169) that although the convicting court's error was not jurisdictional, "exceptional circumstances" justify recourse to habeas corpus. The *Sunal* decision relies upon *Bowen* v. *Johnston*, 306 U. S. 19, 27, but the issue there related to the jurisdiction of the convicting court, and this Court stressed the "exceptional circumstances" involved to justify collateral review of a jurisdictional question which could have been reviewed by appeal. Neither the present case nor the *Sunal* case presents a question going to the jurisdiction of the convicting court; hence, even "exceptional circumstances" cannot inject into the cases the only issue open to collateral inquiry—the power of the convicting court to render the judgment which is attacked.

Respondent's theory here, that habeas corpus is available for the collateral review of the convicting court's trial error, rests on his allegation (R. 7) in the petition for habeas corpus that the entire judicial proceedings, from the indictment through the judgment, are void because founded on an order of the local board which is in excess of the board's jurisdiction. This theory is, of

course, novel; we are aware of no case where a habeas corpus court has gone behind an indictment to inquire into the validity of the administrative action which preceded the judicial proceedings. As we have already pointed out at some length, the jurisdiction of the convicting court here rests on a valid federal statute and on an indictment charging an offense under that statute. But respondent does derive support from a dictum in the *Estep* case—preceded, be it noted, by an "it would seem"—which suggests that habeas corpus might be available after conviction to inquire into the jurisdiction of the local board.

The Court there said (327 U. S. at 123–125):

> If § 11 were not construed to permit the accused to defend on the ground that his local board acted beyond its jurisdiction, a curious result would follow. The remedy of habeas corpus extends to a case where a person "is in custody in violation of the Constitution or of a law * * * of the United States * * *" R. S. § 753, 28 U. S. C. § 453. It has been assumed that habeas corpus is available only after a registrant has been inducted into the armed services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board

> after conviction by habeas corpus. The court would then be sending men to jail today, when it was apparent that they would have to be released tomorrow.
>
> We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. But the fact that habeas corpus after conviction is available in these cases gives added support to our reading of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again.

Relying upon the quoted language, both the Fourth (*Sunal* v. *Large*, 157 F. 2d 165) and the Seventh (*Klopp* v. *Overlade*, decided Dec. 27, 1946) Circuits have held that habeas corpus is available after conviction to inquire into the jurisdiction of the local board.

While the Court did not undertake to spell out the reasoning underlying the dictum here in question, we think—and this is also respondent's interpretation—that the rationale of that expression is that the judicial proceedings are void if the local board exceeded its jurisdiction. But the difficulty with both the *Estep* dictum and with respondent's position in the present case is that there is nothing in any of the habeas corpus au-

thorities which permits such a telescoping of the criminal proceedings.

It is true that Mr. Justice Holmes, dissenting in *Frank* v. *Mangum*, 237 U. S. 309, 346, stated that—

> * * * *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

But the inquiry for which Mr. Justice Holmes argued was one into the criminal trial to determine whether "the processes of justice are actually subverted." 237 U. S. at 347. This is the kind of inquiry which the Court made in the later case of *Moore* v. *Dempsey*, 261 U. S. 86. It is one thing to say that the mob-dominated "trial" considered in *Moore* v. *Dempsey* or the proceeding under review in *Frank* v. *Mangum* was an empty shell; it is quite another to suggest that the judicial proceedings in the convicting court became such because of the trial judge's ruling there. It is tearing words out of context with a vengeance to suggest that Mr. Justice Holmes' dissent in the *Frank* case contemplated an inquiry into administrative proceedings which occurred prior to the commencement of judicial proceedings. Indeed, Mr. Justice Holmes' opinions show a consistent and scrupulous regard for observing

the traditionally limited bounds of the writ of habeas corpus. E. g., *Matter of Moran*, 203 U. S. 96; *Fernandez* v. *Phillips*, 268 U. S. 311; cf. *Lamar* v. *United States*, 240 U. S. 60.

And, as we have already pointed out above, *supra*, pp. 18–19, there is no support in the habeas corpus doctrine of the military cases or the deportation cases cited in footnote 14 of the *Estep* opinion for the dictum now in question. In all of those cases, habeas corpus was the means for obtaining release from custody which rested on an administrative order. None of those cases involved custody based on a judgment of a court. None presented the situation here, where respondent is in custody pursuant to a judgment of conviction, arrived at after a fair trial, and resting on an indictment valid on its face and founded upon a constitutional statute.

It follows that respondent's petition for habeas corpus should have been dismissed.

II

EVEN IF HABEAS CORPUS SHOULD BE HELD TO BE AN AVAILABLE REMEDY UNDER THE *ESTEP* DICTUM, RESPONDENT IS NOT ENTITLED TO BE DISCHARGED UNLESS HE CAN SHOW THAT THE LOCAL BOARD EXCEEDED ITS JURISDICTION IN CLASSIFYING HIM

If, despite the authorities set out in Point I of this brief, the Court should none the less reaffirm the *Estep* dictum, so that habeas corpus is available even after conviction to test the jurisdiction of the local board whose order when disobeyed

occasioned the judicial proceedings, it still does not follow that the judgment below can be affirmed. For what the court below did is in conflict even with the *Estep* dictum.

In support of his contention that the judicial proceedings in the convicting court were void, from indictment through judgment, because founded on an order of the local board in excess of that board's jurisdiction, respondent in his petition for habeas corpus requested the habeas corpus court to inquire into the proceedings before the selective service boards (R. 17–18). The habeas corpus court did so, and concluded that those proceedings were "valid in law and in fact" (R. 72). The court below, however, held that the mere circumstance that respondent's evidence had been excluded in the convicting court voided the conviction, that the habeas corpus court was therefore bound to discharge the respondent forthwith, and that it was not entitled to inquire into the validity of the local board's order.

If the *Estep* dictum is to be followed, we think that the approach of the Fourth and Seventh Circuits in the *Sunal* and *Klopp* cases is to be preferred to that adopted by the Second Circuit below. For the former technique speedily reaches the one basic dispute between the parties—the jurisdiction of the local board—and resolves it. If the dictum in the *Estep* case is to be taken as

establishing the law, then we think it requires that the habeas corpus court must conduct a collateral inquiry into the selective service proceedings to determine whether there is any evidence to support the final classification and whether the registrant was denied any substantial procedural right. This does not mean, as the court below assumed (R. 85–86), that the habeas corpus court is confined to "what chances to be preserved" in the administrative record. We agree with the court below that "anything which in fact tends to establish that the accused did not have a fair hearing" is relevant to an inquiry into the jurisdiction of the local board. See *Eagles* v. *Samuels*, *supra*; slip opinion, p. 7. In our view, however, no reason exists under the theory announced in the *Estep* case why this evidence cannot be initially adduced in the habeas corpus court and considered by that court in determining the jurisdiction of the local board. If the court determines that the local board exceeded its jurisdiction, the writ should be granted, the registrant should be discharged from custody, and there is no occasion for further judicial proceedings. On the other hand, if the habeas corpus court finds against the registrant, he remains in custody to complete his sentence.

Unlike the situation which would exist under the Second Circuit's doctrine, there would be no possibility, as in this case, that a registrant whose

classification is valid would be discharged on habeas corpus without a determination as to the legality of his classification and then be convicted a second time and sentenced anew, possibly receiving no credit for time already served.[9]

Approval of the *Estep* dictum necessarily means that the decision below is erroneous. For while the district court inquired into the jurisdiction of the local board, the circuit court of appeals disapproved of that procedure and did not itself undertake to pass on this question. We submit, therefore, either that the judgment below should be reversed and the case remanded to the circuit court of appeals for consideration of that question, or, in the alternative, that it would be appropriate for this Court to resolve that ques-

[9] Compare the situation in *Klopp* v. *Overlade*, *supra*, where it was urged that the registrant should be discharged from custody, subject to a new trial, without consideration of the question of the jurisdiction of the local board by the habeas corpus court. Prior to the habeas corpus action, on July 17, 1944, Mr. Justice Reed as Circuit Justice had denied in a written opinion an application for bail pending appeal from the judgment of conviction because he concluded after reviewing the evidence that "nothing which has been called to my attention justifies in my view a conclusion that the classification by the local board was arbitrary or beyond their statutory power." Both the district court and circuit court of appeals on habeas corpus rejected the contention of the registrant and inquired into the jurisdiction of the local board, and both courts were convinced that the local board had not exceeded its jurisdiction. Under the Second Circuit's view, the registrant would have been discharged and, it is not improbable, then convicted upon a second trial.

tion at this time, as in *Eagles* v. *Samuels, supra*.[10] See also *Bowen* v. *Johnston*, 306 U. S. 19, 28–30. The latter alternative seems particularly desirable here in view of the fact that a similar issue is before the Court in the *Sunal* case, No. 535, which follows this case an oral argument. We therefore turn to inquire whether the district court erred in concluding that respondent failed to establish that his selective service boards exceeded their jurisdiction.

III

THE DISTRICT COURT CORRECTLY DETERMINED THAT RESPONDENT'S SELECTIVE SERVICE CLASSIFICATION "WAS VALID IN LAW AND IN FACT"

The petition for a writ of habeas corpus (R. 6–19) abounds with allegations which justified issuance of the writ and which, if true, would have required the court to conclude that respondent's board of appeal exceeded its jurisdiction in denying him classification as a minister of religion. As we have shown in the Statement, the writ did issue, petitioner made his returns and

[10] In the *Samuels* case the sole issue before the Court was the propriety of the practice of considering the advisory recommendation of a theological panel. However, as in this case, the selective service file of the registrant was before the Court and even though the Third Circuit had not passed on the question whether there was any evidence to support the classification, this Court did so without remanding the case for consideration of that question by the circuit court of appeals.

a hearing was held in which all the evidence offered by both sides was received. Notwithstanding respondent's abundant offers of proof in the criminal trial and the full allegations of the petition for habeas corpus to the effect that substantial improprieties had occurred in the administrative proceedings, he produced no evidence at the habeas corpus hearing bearing on the legality of the administrative proceedings. Instead, he informed the habeas corpus court that he desired to submit his case on the transcript of the criminal trial and the local board file (R. 38) which were offered in evidence by petitioner.

The transcript of the trial contains some evidence as to the proceedings before the selective service boards and it contains full offers of proof by respondent. However, the Government took the position at the trial that the legality of the administrative proceedings was not an issue, and the trial court, as we have shown, agreed with that view. As a result, the parties were not at issue on the merits of the classification, and the Government made no effort to meet the evidence in this respect which was adduced or offered by respondent. Thus, the only pertinence of the transcript of the trial is to establish that respondent's tendered defense was rejected in the criminal trial.

The only other material evidence in the case is the selective service file.[11] Consequently, the jurisdiction of the local board and the board of appeal must be judged by the facts shown by the file. Those facts are summarized in the Statement, *supra*, pp. 2–5.

Section 5 (d) of the Selective Training and Service Act exempts from military service "Regular or duly ordained ministers of religion." Section 622.44 of the Selective Service Regulations (see 9 F. R. 5202) defines the statutory term as follows:

> (b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.
>
> (c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial, ritual or discipline of a recognized church, religious sect, or religious organization to teach and preach its doctrines and to ad-

[11] There is also in evidence the 1943 yearbook of the Watchtower Bible and Tract Society (R. 43) which the petitioner tendered for the purpose of showing that respondent's name was not included in the list of "pioneers" contained in the yearbook.

minister its rites and ceremonies in public worship; and who customarily performs those duties.

In State Director Advice No. 213–B [12] (*infra*, pp. 60–65), the Director of Selective Service advised the personnel of the Selective Service System that the Jehovah's Witnesses sect is a recognized church, religious sect, or religious organization within the purview of the Act and regulations and that in determining in specific cases whether a member of the Jehovah's Witnesses sect is entitled to classification as a minister of religion they should consider, *inter alia*, the following:

> Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

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[12] This document superseded Opinion No. 14 of the Director of Selective Service, to which reference is made in respondent's selective service file.

We think that the Selective Service System thus has recognized that the religious leaders of the Jehovah's Witnesses sect are entitled to exemption from military service just as the leaders of any other religious group are entitled to classification on IV–D. On the other hand, it is equally clear that the Selective Service Regulations, as construed by State Director's Advice No. 213–B, do not assume that every member of the Jehovah's Witnesses sect shall be exempted from military service. Instead, they contemplate that only those persons who stand in the same relation to the Jehovah's Witnesses sect as recognized ministers in other religions do to their followers shall be classified in IV–D. This view is consistent with the view of the circuit courts of appeal in applying the ministerial exemption to factual situations like that presented in this case. Early in the administration of the Act, Judge Simons speaking for the Sixth Circuit in *Rase* v. *United States*, 129 F. 2d 204, 209, met the question squarely in the following terms:

> The phrase "minister of religion" as used in the Act is to be interpreted according to the intention of the Congress, and not by the meaning attached to it by the members of any particular group. Congress undoubtedly intended to exempt such persons as stand in the same relationship to the religious organizations of which they are members, as do regularly ordained

> ministers of older and better known religious denominations. This is borne out by the provision for the exempting of theological or divinity students. If we understand the appellant's argument, every member of his sect is a minister of religion and so entitled to exemption. No differentiation is to be recognized between shepherd and flock or between pastor and congregants. Followed to its logical conclusion, this would mean that all of the members of any religious group which imposes upon its adherents an obligation to teach and preach its beliefs or to make converts, are exempted under the Selective Service Act without regard to whether such activity constitutes their sole or principal vocation. It is inconceivable that it was the intention of the Congress to incorporate in the Act an exemption so broad and all-embracing. The statutory exemption must be applied in consonance with the clearly apparent purpose of the Congress, and not in response to the interpretation placed upon it by particular religious groups or their adherents.

See also, *Sunal* v. *Large*, *supra*, 157 F. 2d at 175, and cases there cited.

The question which thus remains is whether there is any evidence in the administrative record which supports the appeal board's final determination that respondent was not entitled to classification in IV–D. After an exhaustive

analysis of the facts, the district court concluded against respondent (R. 62–72). Bearing in mind that issues of credibility and of the weight to be given the various items of evidence were for the board of appeal, as the final classifying agency, we think it plain that the district court did not err in its conclusion.

The facts before the board of appeal (see *supra*, pp. 2–5) showed that respondent claimed to have become a minister of religion in 1939 when he was sixteen years old. In 1941, while in this status, he obtained a full-time job as a radio technician with the Radio Corporation of America, and he retained the job until shortly after June 30, 1942, when he registered with his local board. There is evidence that respondent became a "pioneer" in the sect (one who is obligated to devote 150 hours monthly to Jehovah's Witnesses activities) on July 1, 1942, the day following his registration. There is no evidence showing that respondent received training for the ministry other than his statement that he studied the Bible from 1935 to 1939, when he was between the ages of 11 and 16 years old. These facts, coupled with the fact that respondent's name was not included in the list of "pioneers" furnished the Selective Service System by the sect or in the list published in the sect's magazine, "Consolation," which is contained in the file, failed to convince the local board that respondent satisfied his burden of proving

that he was a minister of religion, and he was classified I–A. Thereafter, the local board considered respondent's protest and additional statements from four other Jehovah's Witnesses supporting respondent's claim, and the board changed the classification to IV–D.

It was more than a year later, and only after the board received information from a neighbor that respondent was engaged in secular work as a model and that when he was not doing this he spent most of his time around his home,[13] that the board changed the classification to I–A. Respondent requested another hearing, and he obtained it. And the facts developed confirmed the neighbors' report, at least to the extent of revealing respondent's secular employment as a model, an essential

[13] The court below (R. 86) appears to have been somewhat distressed by the fact that this information was supplied by an identified neighbor who protested the exemption of respondent from service while her three sons were serving under the Act. But it is this very assistance from citizens in the community in which the registrant lives which the decentralized administration of the Act is intended to achieve. By permitting each community to participate in the application of the Act to the members of the community, the Congress insured to the Selective Service System the best efforts of every registrant's neighbors in making sure that all pertinent evidence was before the local board. The fact that material evidence of respondent's secular employment was revealed for the first time by a neighbor demonstrates in one respect the important place of local citizens in effectuating the declaration of Congress "that in a free society the obligations and privileges of military training and service should be shared generally * * *."

fact which he had not communicated to the board. At the hearing, respondent was "evasive" in respect of the board's questions concerning the inconsistency between his efforts to be relieved of service under the act and his secular employment in which he posed in military uniform.

When the local board then refused to change the I–A classification, respondent appealed, and he was permitted to add to the appellate record his statement outlining the basis for his claim to exemption from service. His entire selective service file was before the board of appeal, but the board was not persuaded by respondent's evidence and it refused to classify him in IV–D.

We think it cannot be said from these facts that there is no evidence to support the final classification made by the board of appeal. That board was entitled to regard as persuasive, even though not necessarily conclusive, the facts (1) that respondent was a young boy who had had no specialized religious training in preparation for the ministry other than that which all Jehovah's Witnesses have in studying the Bible; (2) that after respondent claimed to have become a minister, he obtained a full-time secular job as an industrial worker, which he retained until after he registered for the draft; (3) that although there was some evidence that he became a "pioneer" in the sect one day after he registered with his local board, neither the list of "pioneers" furnished the Selec-

tive Service System by the sect [14] nor the list published by the sect in its magazine "Consolation" included respondent's name; (4) that respondent did not inform the local board that he was employed as a model, although at the time he was engaged in this work he was classified as a minister of religion; (5) that the local board thought that his replies to interrogation concerning his secular work were "evasive"; (6) that respondent's claim that he averaged no more than two hours a week in working as a model was not corroborated, although records of his employment undoubtedly were available to him; (7) that a neighbor furnished information that when respondent was not modeling, he was usually at home; and (8) that there is no evidence that respondent performed the functions usually associated with a minister of religion, such as leading the members of the sect in worship, marrying the young, and burying the dead, or that his activities differed in quality from those of any other members of the sect.

While the administrative construction of the ministerial exemption is a broad one, it does not require a classifying board to blind its eyes to

[14] We have been advised by the Selective Service System that it was possible to add names to the list furnished the Selective Service System until October 29, 1942, when the practice was discontinued.

realities. Indeed, State Director Advice No. 213–B (*infra*, p. 64) cautions the boards that—

> Experience has shown that due to the fact that a large proportion of the members of any Jehovah's Witnesses unit claim to be ministers, special care must be used in applying the above-mentioned tests. Information presented in the case of a registrant who claims to be a minister of the Jehovah's Witnesses group must show facts regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status.

Tested in this light, we think the board of appeal could reasonably have concluded that respondent is a devout member of the Jehovah's Witnesses sect, but that is all. The evidence before the board did not require the conclusion that respondent has devoted his life to the furtherance of the beliefs of the Jehovah's Witnesses, or that he performs the functions which are performed by regular or duly ordained ministers of other religions, or that his status in the sect in relation to other members of the sect is the same as that of a minister of his congregation in the other religious groups. Unless the board so found the facts, respondent was not entitled to classification in IV–D (see *infra*, p. 63). In these circum-

stances it obviously cannot be said that the board flouted the command of Congress in denying respondent an exemption as a minister of religion. The judicial inquiry probes no further. See *Eagles* v. *Samuels, supra,* slip opinion, p. 12.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed and respondent remanded to petitioner's custody.

Respectfully submitted.

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MARCH 1947.

APPENDIX

1. The Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix 301–318, provides in part, as follows:

SEC. 5. * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * * * *

SEC. 10. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist

of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (1) of this Act. * * *

* * * * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him

> under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine or not more than $10,000, or by both such fine and imprisonment, * * *.

2. The habeas corpus statute (R. S. §§ 753, 761, 28 U. S. C. 453, 461) provides:

> SEC. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.
>
> * * * * * *
>
> SEC. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

3. State Director Advice (No. 213–B) provides in pertinent part, as follows:

> STATE DIRECTOR ADVICE (No. 213–B)
> Issued: 6/7/44.
> As Amended: 9/25/44.
>
> Subject: The Ministerial Status of Certain of the Officials of Specified Churches, Religious Sects, or Religious Organizations
>
> INTRODUCTION
>
> Concerning the classification of registrants who claim to be ministers of religion, section 622.44, Selective Service Regulations, provides as follows:
>
> "(a) In Class IV–D shall be placed any registrant:
>
> (1) Who is a regular minister of religion, or
>
> (2) Who is a duly ordained minister of religion, or * * *.
>
> "(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.
>
> "(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Part I

1. Because of the unusual nature of the organization and work of certain religious groups, National Headquarters has been called upon, from time to time, to make predeterminations relating to the question of whether a particular group comes within the purview of the Regulations as a recognized church, religious sect, or religious organization.

2. The issuance of a complete list of recognized churches, religious sects, or religious organizations, is not contemplated by this Headquarters. Therefore, the fact that a particular organization is not mentioned in this State Director Advice should not be taken to mean that it is not a recognized church, religious sect, or religious organization.

3. Information will be furnished upon request of any agency of the Selective Service System as to whether a predetermination has been made regarding any particular organization. If no predetermination has been made, a study will be conducted and a predetermination made.

Part II

1. Statements of opinion have been issued occasionally regarding the nature and work of those offices or positions of leadership in a recognized church, religious sect, or religious organization which are generally recognized to be ministerial in nature and function.

2. In Part IV of this State Director Advice is listed information relating to certain offices of ministerial function in various organizations. Each organization referred

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to has been predetermined by National Headquarters to be a recognized church, religious sect, or religious organization within the purview of the Act and the Regulations. The offices of ministerial function of such groups as indicated have been predetermined by National Headquarters to come within the meaning of the Act and the Regulations as offices of regular or duly ordained ministers of religion.

3. The following are the recognized churches, religious sects, or religious organizations concerning which statements of opinion are issued in Part IV of this State Director Advice:

(a) Salvation Army.

(b) Holy Roman Catholic Church—Lay Brothers.

(c) Jehovah's Witnesses.

(d) Church of Christ, Scientist.

(e) Evangelical Lutheran Synod of Missouri, Ohio, and Other States—Christian Day School Teachers.

(f) Evangelical Lutheran Joint Synod of Wisconsin and Other States—Christian Day School Teachers.

(g) Jewish Congregations—Cantors.

(h) Volunteers of America.

(i) Church of Jesus Christ of Latter Day Saints (Mormon).

(j) Seventh-day Adventist Church—Colporteurs and Day School Teachers.

Part III.

1. Whether a registrant who qualifies under the statements hereinbefore made, is actually engaged in the regular discharge of his duties as a regular or duly ordained minister of religion must be determined in

each individual case by the local board or agency of appeal.

2. It is the opinion of National Headquarters that the question of the regular discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified in Class IV–D in accordance with the provisions of paragraphs (b) and (c) of section 622.44 of the Regulations.

3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work.

4. In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status.

* * * * *

3. Jehovah's Witnesses

Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained

ministers of other religions are ordinarily regarded.

Experience has shown that due to the fact that a large proportion of the members of any Jehovah's Witnesses unit claim to be ministers, special care must be used in applying the above-mentioned tests. Information presented in the case of a registrant who claims to be a minister of the Jehovah's Witnesses group must show facts regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status.

Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group are said to receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms.

Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the dissemination of the tenets and beliefs of Jehovah's Witnesses.

A certified official list of members of the Bethel Family and Pioneers has been transmitted to the State Directors of Selective Service by National Headquarters as an attachment to State Director Advice No. 213–C. The members of the Bethel Family and Pioneers whose names appear upon such certified official list were thought at the time the list was issued to come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and if they have continued in the same status, they should be classified in Class IV–D. The status of members of the Bethel Family and Pioneers whose names do not appear upon such certified official list shall be determined as herein provided.

Other members of Jehovah's Witnesses, known by the various names of servant to the brethren, company servant, assistant company servant, backcall servant, territory servant, advertising servant, account servant, stock servant, and other servants, devote their time and effort in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. Servants to the brethren and company servants are believed to hold positions of greater responsibility and leadership than the other servants mentioned; however, the status of all of these "servants" should be determined as herein provided.

* * * * * *

4. One of the latest expressions of the Selective Service System concerning the exemption of Jehovah's Witnesses from military service as ministers of religion is contained in a communi-

cation of July 15, 1946 from the Selective Service System to the General Counsel of the sect, as follows:

JULY 15, 1946.

3–164

Mr. HAYDEN COVINGTON,
117 Adams Street,
Brooklyn, New York.

Subject: Status of Regular or Duly Ordained Ministers of Religion

DEAR MR. COVINGTON: Reference is made to your letter of April 23, 1946, addressed to us regarding the above-mentioned subject with specific reference to the classification of registrants who claim to be ministers of Jehovah's Witnesses. We have noted the statements and comments which you made, and will discuss our position relative to the general subject and also to the specific issues which you have raised.

A study of the legislative history back of the adoption of the Selective Training and Service Act indicates the members of Congress who were concerned with the matter were cognizant of and generally approved the provisions adopted for the exemption of ministers of religion during World War I. For instance, Senator Guffey speaking on the floor of the Senate regarding the amendment which he presented on August 19, 1940, and which embodied much the same wording as that finally adopted, said, "Mr. President, that is the same provision which was included in the Selective Draft of 1917. I think in times like this it is necessary to protect the church as much as any other activity."

It is interesting therefore to note the language used in 1917. The Selective Service Law, approved May 17, 1917, provided in pertinent part:

> "SEC. 4. * * * regular or duly ordained ministers of religion * * * shall be exempt from the selective draft herein provided * * *"

It was then provided in the Selective Service Regulations, Classification Rules and Principles, that:

> "SECTION 79. Class V—Miscellaneous.
> "RULE XLI. In Class V shall be placed any registrant found to be—
> "(a) * * *
> * * * * * *
> "(b) A regular or duly ordained minister of religion.
>
> "NOTE 1.—A duly ordained minister of religion is a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> "A regular minister of religion is one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been

formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"The words 'regular or duly ordained minister of religion' do not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization, nor do the words include a person who may have been duly ordained a minister in accordance with the ceremonial rite, or discipline of a church, religious sect, or organization, but who does not regularly, as a vocation, preach and teach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

We have been mindful that it has been stated in Section 1 of the current Act that "it is imperative to increase and train the personnel of the armed forces of the United States," as well as that it appeared to be the intent of Congress "to protect the church as much as any other activity" through "exempting actual ministers." This last phrase is taken from an expression of Senator Walsh made on the floor of the United States Senate on August 19, 1940. We quote him more fully, but not completely, as follows:

"The difficulty with an amendment of this kind, assuming we all agree to the principle that ministers of the gospel should be exempted, is where the line should be drawn between clergymen who are temporarily engaged as clergymen and religious students who are only part-time students. So far as I am concerned and so far as the representatives of religion who have conferred

with me are concerned, we are very strongly of the opinion that the amendment should have no loopholes in it, and that only ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted.

"The regulations of the War Department which were promulgated in 1917 were in every way satisfactory to these religious groups; and I think the Senator from Colorado, in drafting his amendment, had in mind the language that was used in the law of 1917 and had in mind the expectations that the War Department would promulgate the same regulations if the pending bill should be enacted.

"As I understand, there was in the committee unanimity of opinion in favor of exempting actual ministers of the gospel who are actually performing ministerial and religious duties."

Taking into consideration both the individual and his church, we believe that there are two factors, sometimes overlapping, which may indicate that a man is a minister of religion. The first of these is the religious leadership which a man may demonstrate in his church. Some men have positions of considerable influence and demonstrate qualities of leadership. In other instances the part that a man plays in the church will be less influential but he will show himself to be a minister by devoting his life to the work of his church. Some devote their lives to the ministry to the extent of abstaining from many pleasures of the world and renouncing personal gain in a singleness of devotion to the task which they have accepted.

We believe that whether an official of the Jehovah's Witnesses is to be recognized as a regular or duly ordained minister must be determined in each individual case based not only upon whether he is regarded by other Jehovah's Witnesses as a minister of religion but also upon whether he performs functions which are those generally recognized as religious and ministerial functions normally performed by regular or duly ordained ministers of religion and the extent to which he devotes his life to the furtherance of your beliefs.

From time to time you have furnished us helpful information regarding the organization of the Watchtower Bible and Tract Society. From this information we have gained the impression that many of your Company Servants and Servants to the Brethren hold positions of considerable religious leadership within the organization. We have felt that the demonstration of this leadership may qualify a man to be considered a minister of religion by Selective Service. Where this has been sufficiently demonstrated, we have taken administrative action with a view of having additional consideration given to the question of the man's classification in Class IV-D. This has been done without regard to the question of the registrant's having been engaged in certain secular employment.

We mention this because it appears that you feel undue consideration has been given by Selective Service to the secular employment engaged in by certain Jehovah's Witnesses. We emphasize the fact that in our opinion the controlling factor

in the final analysis of any case wherein a man claims to be a minister is the question of his ministerial work and not that of his secular employment. However, information indicating that a man who claims to be a minister is engaged in secular employment may raise a question regarding the extent that secular employment crowds out and precludes ministerial activities.

We understand that members of the Bethel Family are those members of Jehovah's Witnesses who devote their full-time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which it to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group are said to receive their subsistence and lodging and in addition a very modest monthly allowance.

From this information it appears to us that the members of the Bethel Family stand in a relation to your church similar to that of the minor clergy of some other churches who have devoted their lives to religious service. Their cases should be decided on the basis of the extent to which they demonstrate their devotion of time and effort to their church.

Other members of Jehovah's Witnesses may be judged also by either of these standards. However, it would appear that most of them must be judged on the basis of the extent to which they have devoted their lives to the work of your church. Regarding this we have set no standard number of hours in religious work as a standard,

although you have stated to us that a "Pioneer is required to devote a specified minimum of 150 hours per month to his ministerial duties." You have also told us that "there are also a number of special Pioneers. These are required to devote 175 hours per month to their work * * *."

We had thought that you fully understood our viewpoint to the effect that a registrant who had been a minister of religion forfeited his right to that classification if he did not continue in his ministerial work. For instance on July 3, 1945, you wrote to us concerning one Lloyd Raymond Browne, concerning whom we had previously inquired, and stated:

> "This registrant relinquished his full-time status as a minister and dropped back to part-time status on May 24, 1944, indicating that he desired to return to full-time status later on. Inasmuch as he has not again taken up his full-time status, no objection is registered to his being removed from the certified official list of full-time ministers."

We note also in this connection your letters of March 19, 1946, and April 10, 1946, regarding the case of one Anthony Thomas Raman. In your letter of March 19, 1946, you stated:

> "In view of the fact that Mr. Raman has been serving as a pioneer minister since July 1, 1945, in addition to serving previously during his school work, and since he has filed adequate information showing his ministerial status, it is respectfully requested that your Headquarters have his Cover Sheet sent to your Headquarters

for review, looking to a presidential appeal in behalf of his IV–D claim."

In this letter you stated also that this man had accepted a part-time secular job as a luncheon club waiter. Largely because of that, we requested additional information regarding the nature and extent both of his religious and ministerial activities and of his secular employment. With respect to his ministerial work, the report which you furnished us indicated that he had actually met your standard of "a specified minimum of 150 hours per month" only in August and September of the period specified in your first letter. At this time you stated:

"His time reported to the Headquarters of the Society is as follows:

	Hours		Hours
May 1945	133	October	132
June	150	Nov. 1945	*100
July	138	December	*100
August	153	Jan. 1946	110
September	151	February	106
		March	87

*Ill

As we have stated hereinbefore, we have not accepted your specified number of hours of work for a Pioneer as a standard of work for a member of the minor clergy. But where one of your men fails in meeting that quota, for reasons other than sickness, we feel that no good reason exists for us to take action with a view of procuring a IV–D classification for the man. Accordingly, we informed you that no further action was contemplated in this case.

All information available should be given full and careful consideration in such a case in order to determine the man's proper classification.

While appointment credentials and personal testimonials are helpful, they are not necessarily conclusive and where there is a reasonable doubt regarding a case, complete factual information should be procured in order to determine the real extent to which the man has demonstrated his devotion to the work of his church.

We trust that by the foregoing we have explained how we have tried to give those of your organization who claim to be ministers of religion proper consideration. If the man demonstrates through his religious and ministerial work that he holds a position of leadership in your church and that his exemption "is necessary to protect the church" or if the man demonstrates that he has consecrated his life to religious service, we feel that he is entitled to classification in Class IV–D and exemption from training and service. However, these are matters which must be currently demonstrated in the case of any given registrant.

Should you have any further comments which you may wish to make regarding this matter, they will be given careful consideration.

For The Director,

NEAL M. WHERRY,
Major, AUS,
Chief, Legal and Classification Section,
Camp Operations.

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